CHAPTER 7
CRIMINAL CASE DISPOSITIONS

In Washington, the law governing sentencing and other dispositional matters is generally the same in domestic violence cases as it is in other criminal prosecutions. Washington's general provisions are covered in other publications, and the discussion need not be repeated here. In superior court, *see* Washington State Judges Benchbook, Criminal Procedure, Superior Court and the Adult Sentencing Manual, which is issued annually by the Sentencing Guidelines Commission. In courts of limited jurisdiction, *see* Washington State Judges Benchbook, Criminal Procedure, Courts of Limited Jurisdiction. These books cover in detail matters such as:

- Constitutional provisions, statutes, and court rules
- Respective rights of defendant and State
- Pre-sentence investigation and report
- Forms of sentences, imprisonment, community service, treatment, etc.
- Mitigating and aggravating circumstances
- Exceptional sentences outside standard range
- Credit for time served
- Consecutive and concurrent sentences
- Restitution and costs
- Assessments in addition to fines, restitution, and costs
- Other assessments
- Procedure at sentencing hearing
- Probation, suspended sentences, and deferred sentences
- Scripts for judges

In this domestic violence manual, the discussion focuses on the special considerations that should be taken into account in domestic violence cases.

I. Dispositions and Domestic Violence

Domestic violence is embedded in the customs of people and social institutions and stopping it requires changing both behaviors and belief systems. Such change does not occur quickly. Perpetrators are more likely to change when they have several experiences of being held accountable. It is not arrest alone, or prosecution alone, or conviction alone, or counseling alone that brings about change. It is a combination of these experiences. Domestic violence is learned through a variety of experiences and stopping it requires a variety of experiences. Abusers tend to minimize, deny, or rationalize their behavior. Often they blame others for their abusive behavior. They tend not to be internally motivated to

recognize their destructive patterns nor to seek change. They are more apt to change their abusive behavior when there is external motivation for change.

Too often, victims are told to just leave the situation, to stand up for themselves, to protect the children from the batterer, to go to marriage counseling, etc. This advice is given in the hope that somehow these actions will provide the consistent motivator the batterer needs to make changes. Expecting the victim to take this role not only puts her/him in further danger, but also ignores the reality that domestic violence victims are in severe crisis and may be unable to be consistent. Instead of expecting the victim to be the consistent motivator for the perpetrator, the community, through the criminal justice system, must play that role.

To maximize the effectiveness of dispositions, judges should provide multiple ways to convey the message that domestic violence is never justified and that it is always the responsibility of the perpetrator to change that behavior. This may be done through a combination of jail time, restitution, community service, fines, restriction on access to the victim, and court-ordered counseling. It is the consistency and repetition of the message in multiple ways with clear sanctions that changes perpetrators of domestic violence.

The objectives of a disposition in a domestic violence case should be to:

1. **Ensure a fair trial for all participants.**
2. **Stop the violence.**
3. **Protect the victim.**
4. **Protect the children and other family members.**
5. **Protect the public.**
6. **Uphold the legislative intent that domestic violence be treated as a serious crime, and to communicate that intent to the offender and to the victim.**
7. **Hold the offender accountable for the violent behavior and for stopping that behavior.**
8. **Rehabilitate the offender.**
9. **Provide restitution for the victim.**

The United States Attorney General's Task Force on Family Violence Final Report concluded that:

> The imposition of a just sentence is the desired culmination of any criminal proceeding. The sanction rendered is not only punishment for the offender but also an indication of the seriousness of the criminal conduct and a method of providing protection and support to the victim. Too often, in family violence cases, the sentence fails . . . Judges and the sentences they impose can strongly re-enforce the message that violence is a serious criminal matter for which the abuser will be held accountable.

Judges should not underestimate their ability to influence the defendant's behavior.[1]

Whether a domestic violence case results in conviction and sentencing, diversion, or even dismissal, the court's handling of the case plays a critical role in addressing the conditions that allow domestic violence to continue and to escalate.

II. Pretrial Dispositions

A. Options: Limitations and Recommendations

The following is a brief summary of the various options for pretrial disposition of a case. Sentencing options, whether following trial or a guilty plea, are discussed in Section III. A brief discussion of domestic violence treatment occurs in Section VI.

1. Diversion by prosecuting authority before charges are filed

Although the term diversion is used somewhat loosely, the Washington State Task Force on Domestic Violence recommended that use of this term be restricted to programs operated by the prosecuting authority. Specifically, diversion programs are those in which, before charges are filed, the defendant agrees to complete a number of conditions—normally treatment and good behavior. If the defendant successfully complies, the prosecutor will decline to file the charges. If the defendant does not comply, charges will be filed and the case will be handled as are all other criminal cases. The Domestic Violence Task Force recommended that diversion not be used in domestic violence cases.[2]

RCW 9.94A.411(2) discourages the use of diversion in prosecutions for rape, child molestation, and incest. Although not absolutely prohibiting diversion in these cases, the Legislature has indicated that pre-filing counseling is not a substitute for criminal prosecution.

The victim should be notified by the prosecutor of any decision to divert or otherwise to decline to file a case.

In any event, diversion as defined above requires little, if any, involvement by the court, and thus is beyond the scope of this domestic violence manual.

2. Deferred prosecutions

Deferred prosecutions are provided for in Chapter 10.05 RCW. Chapter 10.05 RCW provides for a structured two-year program of treatment when it has been established that the wrongful conduct was caused by alcoholism, drug addiction, or mental illness. Deferred prosecutions are available only for misdemeanors and gross misdemeanors. A defendant who successfully completes a deferred prosecution program is entitled to have his or her case dismissed.

Although alcoholism, drug abuse, or mental illness may exacerbate the violence, domestic violence is not caused by any one of these factors and does not stop when these factors are resolved.

The Domestic Violence Task Force has recommended that deferred prosecutions not be granted in cases of domestic violence.

3. Dispositional continuances

Dispositional continuances are court-approved agreements between the prosecuting attorney and the defense. In essence, the court agrees to dismiss the charges if certain conditions are met. A speedy trial waiver is always required. In some cases, the defendant may also (1) waive his or her right to a trial by jury or (2) agree to a stipulated facts trial (submittal) if a violation of the conditions is established.

4. Stipulated Order of Continuance (SOC)

A Stipulated Order of Continuance (SOC) is a specialized form of a dispositional continuance. In an SOC, the defendant agrees to complete a structured domestic violence treatment program and other conditions in return for eventual dismissal of the charge. The defendant is required to waive his right to a speedy trial and to agree to submit the case on the basis of the police reports if the conditions are not satisfied.

The Task Force recommended that an SOC program be developed for handling appropriate domestic violence cases. This option is discussed in detail at Section II, B.

5. Civil compromise

A civil compromise is essentially an agreement by which the defendant compensates the victim for any loss in return for dismissal of the charges. RCW 10.22.010. A civil compromise is not available in domestic violence cases. RCW 10.22.010(4) provides:

> [An] offense may be compromised . . . except when it was committed: . . . [b]y one family or household member against another as defined in RCW 10.99.020 and was a crime of domestic violence as defined in RCW 10.99.020.

B. Stipulated Order of Continuance (SOC)

A Stipulated Order of Continuance (SOC) is a pretrial disposition option in the state of Washington. In an SOC, in return for completion of a number of conditions, a case is dismissed at the end of the monitored program. For a more detailed discussion regarding the pros and cons of entering such an order, *see* the *Final Report of the Washington State Domestic Violence Task Force*. Such programs require careful screening by the prosecuting authority and are inappropriate when the crime in question is particularly serious.

SOC programs allow for continued control of the offender and are designed to assist the repentant perpetrator in stopping the violence. The SOC program allows the court to exercise some control over the defendant but avoid the time of a trial.

SOCs have the advantage of offering a quick resolution of the matter. Rehabilitation programs appear to be more effective when they quickly follow the arrest.

1. Procedure

a. Waiver of defendant's rights

The Task Force recommended that only Stipulated Orders of Continuance (SOC), which require a stipulation to the police report, be approved by the court. If (as would be the usual situation), this stipulation also is intended to waive the right to trial by jury, a written waiver must be obtained. *Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). CrRLJ 6.1.2 contains a model form for a "submittal."

Every SOC must be accompanied by a speedy trial waiver.

b. Presence of counsel

Because entry into an SOC program involves the waiver of a number of important constitutional rights, the defendant is entitled to be represented by an attorney. If counsel is not present, a full colloquy concerning waiver of the right to counsel must be undertaken by the court. *See State v. Christensen*, 40 Wn. App. 290, 295, 698 P.2d 1069, *review denied*, 104 Wn.2d 1003 (1985).

c. Length of an SOC

The Task Force recommended that the SOC period be for two years. A dismissal date must be set at the time the order is initially entered.

2. Eligibility requirements

The Domestic Violence Task Force has set forth the following recommendations concerning eligibility for domestic violence treatment:

a. No prior convictions for crimes of violence within seven years (including juvenile convictions committed after age 16).

b. No prior convictions for domestic violence crimes within seven years.

c. Current offense is not a felony.

d. No use of weapons in current offense.

e. Current offense did not result in injuries that required medical treatment.

f. Current offense is not a violation of an existing domestic violence protection order, no-contact order, or restraining order.

g. Offender does not have an extensive criminal record of any kind.

h. Before the court signs the order, the court should advise the defendant that an SOC will not be granted in a case where the defendant sincerely believes he or she is innocent of the charge.

3. Content of an SOC

a. Domestic violence rehabilitation programs

Domestic violence treatment is a specific treatment modality. The experience of practitioners in the field has shown that generic counseling or even "anger management" is not adequate. Domestic violence is the result of multiple factors that must be specifically addressed if the pattern is to be eliminated. An agency that holds itself out as treating domestic violence perpetrators must be certified by the Department of Social and Health Services. RCW 26.50.150.

A review of the statutory requirements for domestic violence treatment is found in Section VI. A copy of the Washington Administrative Code provisions implementing RCW 26.50.150 is contained in Appendix A. A discussion of the components of an appropriate domestic violence treatment program is also contained in Appendix A.

b. No-contact order

When desired by the victim (or otherwise deemed appropriate by the court), a no-contact order should be entered pursuant to RCW 10.99.040(2),(3). In addition, the SOC should specifically indicate that violation of the no-contact order will result in revocation of the SOC.

c. No criminal law violations

d. Restitution (where appropriate)

e. Substance abuse treatment (where appropriate)

Substance abuse treatment, although often required, is not a substitute for domestic violence rehabilitation. Although some incidents of battering may be more severe when the batterer is under the influence of alcohol or drugs, the battering does not stop simply because the substance abuse problem is cured. In addition, as part of the assessment

interview required under WAC 388-60-0165, the agency doing batterer's treatment must obtain a substance abuse screening. The agency may allow a client to participate in other types of therapy, including substance abuse evaluations or treatment, during the same period the client is participating in the required domestic violence treatment. The program must determine that the participant is stable in the participant's other treatments before allowing the participant to participate in treatment for domestic violence. WAC 388-60-0095.

f. Court costs and monitoring fees

Court costs cannot be imposed in an SOC because a finding of guilty has not been entered. *State v. Friend*, 59 Wn. App. 365, 367, 797 P.2d 539 (1990). In response to *Friend*, the Legislature amended RCW 10.05.170 to permit imposition of court costs in deferred prosecution orders. This amendment, however, did not repeal RCW 10.01.160 – the general authority to impose court costs that was at issue in *Friend*.

Probation monitoring fees can be imposed whenever an individual has been referred to probation. There is no requirement that the defendant have been convicted of a crime.

NOTE: Only agreements that comport with the revenue distribution scheme outlined in RCW 3.50.100 and RCW 3.62.090 should be approved by judicial officers. *See* Washington State Ethics Advisory Opinion 04-05 (Aug. 16, 2004).

g. Court monitoring of offender

The order must provide for some clear monitoring of the rehabilitation provisions. Ideally, this should be done through the court's probation office. In courts without probation officers, rehabilitation agency reports should be monitored monthly by the prosecuting attorney or by court personnel.

4. Revocation

Because the granting of an SOC is similar to the granting of a deferred prosecution, due process requirements must be met in

revoking an SOC. *See State v. Marino*, 100 Wn.2d 719, 725, 674 P.2d 171 (1984).

a. Inability to pay for treatment

If the court concludes that a defendant cannot pay for the cost of treatment, termination of the SOC is not appropriate. However, a finding that a defendant made a deliberate choice to make treatment a low priority will support revocation. *State v. Kessler*, 75 Wn. App. 634, 640, 879 P.2d 333 (1994) (pre-filing diversion case). At least under the Sentencing Reform Act (SRA), once the State has established non-compliance, the burden of showing that the violation was not willful shifts to the defendant. A mere claim of indigence is insufficient to meet this burden. *State v. Gropper*, 76 Wn. App. 882, 887, 888 P.2d 1211 (1995). *Accord*, *State v. Woodward*, 116 Wn. App. 697; 667 P.3d 530 (2003).

b. Lack of amenability for treatment

The WAC provisions governing domestic violence treatment programs require that every defendant referred for batterer's treatment undergo a significant assessment process. If the defendant is eligible for treatment, a treatment plan is adopted.

The question of whether revocation is proper for a defendant who made a good faith effort to gain entrance into a treatment program but who was found to be not amenable to treatment is complex. Under the SRA, the question of whether a violation is willful is relevant only when considering allegations of failure to pay financial obligations and failure to complete community service hours. RCW 9.94A.634, 9.94A.737. However, in *State v. Peterson*, 69 Wn. App. 143, 148, 847 P.2d 538 (1993), Division III held that it was improper to sanction an offender for not complying with a sentence requirement that he participate in crime-related treatment or counseling services where he was unable to enroll in the particular program he had been referred to by his CCO. The court did not address the question of whether an offender who was not amenable to any available treatment could be sanctioned for not entering treatment.

As concerns for both victim and community safety are not satisfied when a defendant either does not enter or does not successfully participate in domestic violence treatment, great care should be taken in crafting a sentence that includes domestic violence treatment as a component to avoid the problems confronting the court in *Peterson*.

NOTE: Statutory and WAC provisions regarding batterer's treatment are discussed in detail at Section VI of this chapter. A copy of the current WAC provision is found in Appendix A.

III. Sentencing Under the Sentencing Reform Act (SRA) in Domestic Violence Cases

The sentence options available to the court in a case involving domestic violence under the SRA are the same options available for any other crime subject to the SRA. However, the court should be particularly sensitive to the mandate of RCW 9.94A.500 which requires that the court allow participation by the victim, the survivor of the victim, or a representative of the victim, and from an investigating law enforcement officer before imposing sentence.

With the enactment of the Offender Accountability Act, effective date July 1, 2000, community supervision and community placement have been abolished. All offenders who are subject to post-confinement release are sentenced to a community custody range. An allegation that an offender has violated a term of community custody is now handled by the Department of Corrections; the offender is not referred back to the sentencing court.

A. Conditions Other Than Confinement

1. Domestic violence rehabilitation programs under the SRA

Conviction of most felony domestic violence offenses will result in the imposition of a community custody term. Community custody is to be imposed when a defendant is convicted of a "sex offense," a "violent offense," or a "crime against person."[3] RCW 9.94A.710. Definitions of violent and sex offenses are contained in RCW 9.94A.030. The definition of a crime against person is contained in RCW 9.94A.411(2), and includes violation of protection and no-contact orders. Finally, when the court sentences a defendant pursuant to the "first offender waiver," a term of community custody may be imposed. Community custody ranges are found in WAC 437-20-010.

Under the current statutory scheme, a court may order the "offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense." RCW 9.94A.715(2)(a).

On its face, RCW 9.94A.715 would appear to authorize a court to impose domestic violence treatment whenever the court deems such a requirement appropriate. However, the provision authorizing imposition of a requirement to complete a domestic violence perpetrator program, RCW 9.94A.505(11), is more narrowly crafted. That statute authorizes a court to impose domestic violence treatment following a conviction for a crime of domestic violence only when either the offender or victim has a minor child – a restriction not contained in RCW 9.94A.715. On the other hand, RCW 9.94A.505(11) addresses not only community custody but also community placement and community supervision terms. Thus, determining which statute – RCW 9.94A.715 or RCW 9.94A.505(11) – is the more specific is not easy. *See* generally *Waste Management of Seattle, Inc. v. Utilities and Transportation Commission*, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994) (when two statutes conflict, the more specific prevails over the more general).

2. No-contact with the victim

The court may issue a written no-contact order for a period up to the maximum allowable sentence for the crime (not merely for the standard range). RCW 10.99.050. A certificate of discharge issued pursuant to RCW 9.94A.637 does not, by itself, act to terminate a no-contact order. Unless the order has been terminated by the sentencing judge or has expired by its own terms, violation of the order is a crime and is fully prosecutable as such. RCW 9.94A.505(4).

NOTE: *State v. Miniken*, 100 Wn. App. 925, 927, 999 P.2d 1289 (2000), which held that a certificate of discharge would render a no-contact order unenforceable, was decided under a prior version of RCW 9.94A.737. Its continuing validity is doubtful.

Violation of a domestic violence no-contact order is a separate offense. RCW 10.99.050(2). Imposition of a period of confinement following a finding that defendant violated a "crime-related" condition by contacting the victim does not bar a subsequent trial for the crime of violating a no-contact order. *State v. Grant*, 83 Wn. App. 98, 111, 920 P.2d. 609 (1996). Accord,

State v. Prado, 86 Wn. App. 573, 578, 937 P.2d 636, *review denied*, 133 P.2d 1018 (1997).

3. No-contact with witnesses or non-victim children

RCW 9.94A.700(5)(b) provides that the court may enter an order prohibiting the defendant from having any contact with the victim or a specific class of individuals. The potential duration of the order is the maximum allowable sentence for the crime, regardless of the expiration of the defendant's term of community supervision.

A condition of sentence prohibiting a defendant from all contact with his/her children who were witnesses but not victims, of a crime of domestic violence is, under some factual situations, an abuse of discretion. The "fundamental right to parent" can only be subject to limitations that are "reasonably necessary to accomplish the essential needs of the state." *State v. Ancira*, 107 Wn. App. 650, 653-4, 27 P.3d 1246 (2001) (quoting *State v. Riles*, 135 Wn.2d 326, 350, 959 P.2d 655 (1998)). The record before the court in Ancira did not support a conclusion that the State's valid interest in protecting the children from witnessing future acts of domestic violence could be satisfied only by an order prohibiting all contact.

On the other hand, a criminal judge is not prohibited from imposing some limitations on a defendant's contact with his children. As the court stated,

> On this record, some limitations on *Ancira's* contact with his children, such as supervised visitation, might be appropriate even as part of a sentence. Generally, however, the criminal sentencing court is not the proper forum to address these legitimate concerns other than on a transitory basis . . .
>
> . . . We agree that *Ancira's* children, as witnesses, were directly connected to the circumstances of the crime. However, this does not ameliorate the constitutional problems . . .

This matter is best resolved by the family court in the dissolution proceeding. *Ancira* at 655-57.

Further, a no-contact order barring a defendant from having contact with the mother of his children, following a criminal

conviction, is not violative of the defendant's due process right to parent simply because it makes the practicalities of exercising that right more cumbersome. *State v. Foster*, 128 Wn. App. 932, 117 P.3d 1175 (2005).

4. Restitution[4]

a. When may restitution be ordered?

Restitution is an independent element of the sentence that may be ordered regardless of the determinate sentence imposed by the court. The decision on whether to order restitution is not dependent upon the seriousness level, the offender score, or the sentencing range.

b. When must restitution be ordered?

Restitution must be ordered whenever an offender is convicted of an offense resulting in injury to any person or loss/damage to property unless extraordinary circumstances exist, which, in the court's judgment, makes restitution inappropriate. In those cases the court must set forth the circumstance in the record. RCW 9.94A.753.

c. What losses are compensable?

Restitution must be based on easily ascertainable damages, actual expenses incurred, or lost wages. Thus, in *State v. Lewis*, 57 Wn. App. 921, 926, 791 P.2d 250 (1990), the court held that future earning losses were not compensable because they were neither "easily ascertainable damages" nor lost wages. Exact accounting is not, however, required. Where the amount of loss is not specifically provable, restitution may still be ordered so long as the record provides a reasonable basis for the court to estimate loss so that the award of restitution is not based on "mere speculation." *State v. Fleming*, 75 Wn. App. 270, 275, 877 P.2d 243 (1994) (internal citation omitted). An award of restitution may include an obligation to pay damages that flowed from the crime, even if such loss were not foreseeable. *State v. Enstone*, 137 Wn.2d 675, 682-3, 974 P.2d 828 (1999).

Restitution may include payment for both public and private costs. Costs of counseling reasonably related to the offense may be ordered as a part of restitution. However,

restitution may not include reimbursement for mental anguish, pain and suffering, or other intangible losses. RCW 9.94A.753(3).

Thus, in a domestic violence case, compensable items might include:

(1) Lost wages
(2) Medical bills, including ambulance and emergency room fees
(3) Destroyed clothing, automobiles, or other property
(4) Replacement of locks
(5) Transportation expenses to escape the violence
(6) Motel or hotel bills
(7) Moving expenses
(8) Costs of staying at a battered women's shelter
(9) Counseling for the victim and children

The amount may not exceed double the amount of the defendant's gain or the victim's loss. RCW 9.94A.753(3)

d. Enforcement of the restitution order

RCW 9.94A.753(4) establishes the enforcement period for restitution obligations.

For offenses committed prior to July 1, 2000, the defendant remains under the court's jurisdiction for up to ten years after the imposition of sentence, or release from confinement, regardless of the expiration of the defendant's term of supervision and regardless of the statutory maximum for the crime. Prior to the expiration of the initial ten-year period, the superior court may extend jurisdiction for an additional ten years.

For offenses committed after July 1, 2000, the offender remains under the court's jurisdiction until the restitution obligation is satisfied, regardless of the expiration of the term of supervision and regardless of the statutory maximum for the crime.

B. The Exceptional Sentence Under the SRA

Until recently, in order to impose exceptional sentences the court only needed to articulate adequate findings of fact and law warranting the sentence. However following the watershed case *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), with the exception of prior convictions, only those facts found by a jury or stipulated to by the defendant can serve as basis for enhancing a sentence over what otherwise would be the maximum imposable sentence. In this context, the maximum sentence is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 124 S. Ct. at 2537 (citing *Ring v. Arizona*, 536 U.S. 584, 602, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)).

A thorough discussion of Blakely is beyond the purview of this Manual. A more detailed discussion can be found in Seth Fine and Douglas Ende, 13B *Washington Practice: Criminal Law*, § 3807.5 and §§ 3901 *et seq* (2006 Supplement). In addition, at least as of December 2005, the law in this area is still unsettled, with competing legislative proposals under consideration. Great care should be taken in relying on cases decided prior to 2004.

1. What are "prior convictions?"

Blakeley excluded "prior convictions" from the facts that must be found before a sentence above the statutory maximum can be imposed—as such a fact already has been established beyond a reasonable doubt, with at least the right to have had the determination made by a jury.

a. Community custody status

RCW 9.94A.525(17) provides that an offender on "community placement" (defined in RCW 9.94A.030(7) as including community custody) shall be scored with an additional point. Division I has determined that this is a question of law to be determined by the sentencing court. *State v. Jones*, 159 Wn.2d 231, 149 P.3d 636 (2006), *cert. denied sub nom. Thomas v. Washington*, 167 L. Ed. 2d 790 (2007). This resolved an earlier split in the Court of Appeals.

b. Determination that sentence is clearly too lenient to be made by jury

The Sentencing Reform Act has long contained a provision authorizing the imposition of an exceptional sentence if the "presumptive sentence" would result in a sentence that is clearly too lenient. The current version is contained in RCW 9.94A.535(2)(b). The court in *State v. Hughes*, 154 Wn.2d 118, 110 P.3d 192 (2005) concluded that, even though based on defendant's prior convictions, the determination that a sentence is "too lenient" must be made by the jury.

2. Retroactivity

The *Blakeley* decision is applied to cases on direct appeal as of the date of the decision. *See, e.g., State v. Williamson*, 131 Wn. App. 1, 86 P.3d 1221 (2004). It does not apply to defendants whose appeal period has expired and who are collaterally attacking their convictions. *In re Personal Restraint of Markel*, 154 Wn.2d 262, 111 P.3d 249 (2005).

3. The legislative response

Effective April 15, 2005, the legislature amended RCW 9.94A.535 and adopted RCW 9.94A.537 to address issues arising in *Blakely*. The legislature adopted a number of potential aggravating and mitigating factors and limited the court to considering only those factors in determining the sentence. In addition, some of the factors are to be found by the court (those contained in § 2 of the statute) and some to be found by the jury (those contained in § 3). RCW 9.94A.537 sets out the procedures to be followed.

NOTE: Several of the factors reserved to the court in RCW 9.94A.535(2) are those found to be subject to a jury determination by *Hughes*—and likely cannot constitutionally be imposed without a jury determination. *Hughes* was decided on April 14, 2005—only one day before the legislation became effective on an emergency basis.

4. The exceptional "up"

Statutory grounds for an exceptional up are contained in RCW 9.94A.535(2)(3). Great care should be taken in relying on prior case law affirming an exceptional sentence on grounds not authorized by RCW 9.94.535(2)(3) or by other provisions of the SRA.

The following is a list of those statutory factors most likely to apply in a domestic violence prosecution. The letters refer to the subsection of RCW 9.94A.535(3) in which they are contained. Case law citations summarize pre-*Blakely* rulings that appear to still be relevant. In light of *Hughes*, no summary of the judge-imposed findings authorized by RCW 9.94A.535(2) is included.

(3) Aggravating Circumstances – Considered by a Jury – Imposed by the Court. RCW 9.94A.535.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(e) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(f) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time; *See State v. Barnett,* 104 Wn. App. 191,

203, 16 P.3d 74 (2001) (two-week period of abuse is not a prolonged period of time);

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(g) The offense resulted in the pregnancy of a child victim of rape.

(h) The offense involved a high degree of sophistication or planning.

(i) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense. *See also State v. Perez-Garnica*, 105 Wn. App. 762, 771-2, 20 P.3d 1069 (2001) (defendant in special position of trust to sister-in-law: minor victim); *State v. Bedker*, 74 Wn. App. 87, 95, 871 P.2d 673, *review denied*, 125 Wn.2d 1004 (1994) (defendant used his position as a family member to facilitate offense: adult victim).

(j) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment. *See also State v. Barnes*, 117 Wn.2d 701, 712, 818 P.2d 1088 (1991); *State v. Pryor*, 115 Wn.2d 445, 454, 799 P.2d 244 (1990).

(k) The offense involved an invasion of the victim's privacy. *State v. Falling*, 50 Wn. App. 47, 55-56, 757 P.2d 1119 (1987) (rape of victim in her bedroom). *Accord, State v. Collicott*, 118 Wn.2d 649, 662, 827 P.2d 263 (1992) (bedroom in a temporary residence such as a treatment center can be a "zone of privacy"). Where commission of the offense, by its very terms, requires that the "zone of privacy" be invaded, this factor cannot be used to grant an exceptional sentence upward. *See State v. Post*, 59 Wn. App. 389, 401-2, 797 P.2d 1160 (1990), *aff'd* 118 Wn.2d 596, 826 P.2d 172 (1992) (burglary conviction). The "at home" burglary situation has not been addressed by RCW 9.94A.535(b)(3)(u).

(l) The defendant demonstrated or displayed an egregious lack of remorse.

(m) The offense involved a destructive and foreseeable impact on persons other than the victim. *See State v. Barnes*, 58 Wn. App. 465, 475, 794 P.2d 52 (1990) (children were present when the defendant murdered his wife and assaulted her cousin), *rev'd on other grounds*, 117 Wn.2d 701, 818 P.2d 1088 (1991).

(n) The defendant committed the current offense shortly after being released from incarceration.

(o) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(p) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).

5. The exceptional "down"

In *State v. Hobbs*, 60 Wn. App. 19, 24-25, 801 P.2d 1028 (1990), *review denied*, 116 Wn.2d 1022, 811 P.2d 219 (1991), the Court of Appeals held that it was error to grant an exceptional sentence downwards because the offender and the victim reconciled. The court stated:

> If reconciliation in itself were to be considered a mitigating factor, a number of principles of the Sentencing Reform Act would be compromised. First, because it has nothing to do with the seriousness of the offense, treating reconciliation as a mitigating factor frustrates the goal of proportionality of punishment. In addition, by allowing a later reconciliation to excuse prior violence, the goal of promoting respect for the law through just punishment would be thwarted. (Citations omitted.)

C. The First Offender Option

1. In certain crimes if the offender is a "first offender," the court has more sentencing options available.

A first time offender is any person who has never before been convicted of a felony in any state or federal jurisdiction and has never participated in a program of deferred prosecution for a felony offense. Additionally, to be eligible for first offender treatment the offense must not be classified as a violent offense, sex offense or most drug offenses. RCW 9.94A.650(1). A juvenile adjudication for an offense committed before age fifteen is not a previous felony offense for purposes of determining first offender status unless it was an adjudication involving a sex offense or a serious violent offense.

2. In sentencing a first time offender the court may:

a. Waive the imposition of a sentence within the standard range and impose a sentence which may include up to 90 days of confinement in a facility operated under contract with the county and require that the offender refrain from committing any new offenses;

b. Require up to two years of community custody which, in addition to any crime-related prohibitions, may require that the offender perform any one or more of the following:

(1) Devote time to a specific employment or occupation;

(2) Undergo available outpatient treatment for up to two years or impatient treatment not to exceed the standard range of confinement for that offense;

(3) Pursue a secular course of study or vocational training;

(4) Remain within prescribed geographical boundaries and report to the community corrections officers in advance of any changes of residence and/or job;

(5) Report as directed to the court and CCO;

(6) Pay all legal financial obligations as ordered and/or perform community service work.

RCW 9.94A.650.

In certain domestic violence offenses, the utilization of the first offender option allows the court to structure a rehabilitation program that affirmatively addresses the underlying issues of domestic violence. The court has the authority to order batterer's counseling and substance abuse treatment where appropriate.

A discussion of the statutory requirements for domestic violence treatment providers is found in Section VI. The efficacy of treatment is discussed in Appendix A.

IV. Non-SRA Sentencing: Misdemeanors and Gross Misdemeanors

A. Comparison of Felony and Non-Felony Sentencing

A court, whether a superior court or a court of limited jurisdiction, imposing a sentence upon conviction of a misdemeanor or gross misdemeanor is not bound by the Sentencing Reform Act.

The non-felony sentencing judge is not bound by the presumptive range of the comparable felony and may impose up to the maximum misdemeanor or gross misdemeanor sentence subject to the Eighth Amendment proscription against cruel and unusual punishment. *State v. Bowen*, 51 Wn. App. 42, 48, 751 P.2d 1226, *review denied, 111 Wn.2d 1017* (1988) (defendant acquitted on the felony and convicted of the lesser-included misdemeanor: defendant could be sentenced to a sentence greater than that of the presumptive range on the felony).

B. Misdemeanor Probation

1. Length of probation

The maximum jurisdiction of a court of limited jurisdiction is two years. RCW 3.66.067; RCW 3.66.068; RCW 35.20.255. This period cannot be increased by agreement or stipulation. *See In re Wesley v. Schneckloth*, 55 Wn.2d 90, 93-94, 346 P.2d 658 (1959).

If the court originally imposes a period of probation shorter than the two-year period, the defendant is entitled to notice and a hearing before the length of probation can be increased to the two-

year maximum. *State v. Campbell*, 95 Wn.2d 954, 958-59, 632 P.2d 517 (1981).

The period of probation is tolled when the defendant has absconded, is in custody in another jurisdiction, is in a mental hospital, or has otherwise removed him or herself from the power of the court. *State v. Campbell*, *supra*. *But see Spokane v. Marquett*, 103 Wn. App. 792, 14 P.3d 832, *review granted*, 143 Wn.2d 1013 (2001).

2. Restitution

In non-felony cases, restitution is generally imposed as a condition of probation and is discretionary with the court. RCW 9.95.210. As is the case with felonies, restitution must be easily ascertainable. Restitution for future medical expenses, future earnings, or lost retirement benefits is not proper. *State v. Lewis*, 57 Wn. App. 921, 926, 791 P.2d 250 (1990).

Restitution is not limited to the amount necessary to establish a conviction and may be up to the amount of actual loss. *State v. Rogers*, 30 Wn. App. 653, 658, 638 P.2d 89 (1981).

Restitution in lieu of a fine is authorized, within certain limits, by RCW 9A.20.030.

3. No-contact orders

If the victim desires to have no contact with the defendant (or if the court, for some other reason believes imposition of such an order is appropriate), the order should be fashioned to meet two separate (but related) concerns.

a. No-contact order as a condition of a suspended or deferred sentence

(1) Violation of this type of order, like violation of other conditions of probation, can result in revocation of any period of confinement that had been suspended or deferred.

(2) The standard of proof for revoking probation is preponderance of the evidence. *In re Boone*, 103 Wn.2d 224, 691 P.2d 964 (1984).

(3) A probation revocation matter is heard by the court; there is no right to trial by jury. *See State v. Cyganowski*, 21 Wn. App. 119, 122, 584 P.2d 426 (1978) (revocation based on a violation of a probation condition of no criminal law violations can be heard before trial on the new case).

(4) Revoking probation for violation of a provision of no contact does not act as a bar to a subsequent criminal prosecution for a violation of RCW 10.99.050. *State v. Grant*, 83 Wn. App. 98, 111, 920 P.2d 609 (1996). *Accord, State v. Prado*, 86 Wn. App. 573, 578, 937 P.2d 636, *review denied*, 133 Wn.2d 1018 (1997).

b. No-contact order pursuant to RCW 10.99.050

(1) A no-contact order under Chapter 10.99 RCW may be imposed even when the court imposes the maximum possible term of incarceration.

(2) Violation of a no-contact order entered pursuant to RCW 10.99.050 is a separate crime. When an assault or reckless endangerment is committed while a no-contact order is pending, violation of the order is a felony. A third violation of any order entered for the protection of a domestic violence victim is a felony.

(3) The standard of proof for establishing a conviction under RCW 10.99.050 is proof beyond a reasonable doubt. There is, of course, a right to a trial by jury.

4. Other conditions of probation: treatment requirements

A court in a non-SRA setting may impose treatment programs or other conditions that are reasonably related to the rehabilitation of the offender. *State v. Barklind*, 12 Wn. App. 818, 823, 532 P.2d 633 (1975), *aff'd*, 87 Wn.2d 814, 557 P.2d 314 (1976). The court is given wide discretion in fashioning appropriate terms of probation. However, such discretion is limited; a probation requirement that would subject the probationer to a significant risk of harm is unreasonable. *State v. Langford*, 12 Wn. App. 228, 230, 529 P.2d 839 (1974), *review denied* 8 Wn.2d 1005 (1975) (requirement that defendant reveal the names of drug dealers as a condition of probation).

5. Supervision of defendant sentenced for a gross misdemeanor in superior court.

RCW 9.95.204 provides that the Department of Corrections has "initial responsibility" for supervision, but authorizes the county to contract with the Department to undertake supervision. In counties where no such agreement has been reached, only those defendants who meet the requirements of RCW 9.94A.501 will be supervised by the Department of Corrections. A conviction for a non-felony domestic violence offense, without more, does not qualify for supervision.

V. Imposition of Sanctions Under SRA or Revocation of a Suspended or Deferred Sentence for Failure to Comply with Treatment Requirement

A. Inability to Pay for Treatment

If the court concludes that a defendant cannot pay for the cost of treatment, revocation is not appropriate. However, a finding that a defendant made a "deliberate choice to make this [therapy] obligation a low priority" will support revocation. *State v. Kessler*, 75 Wn. App. 634, 640, 879 P.2d 333 (1994) (pre-filing diversion case). At least under the SRA, once the State has established non-compliance, the burden of showing that the violation was not willful shifts to the defendant. A mere claim of indigence is insufficient to meet this burden. *State v. Gropper*, 76 Wn. App. 882, 887, 888 P.2d 1211 (1995). *Accord, State v. Woodward*, 116 Wn. App. 697; 667 P.3d 530 (2003).

B. Lack of Amenability for Treatment

The WAC provisions governing domestic violence treatment programs require that every defendant referred for batterer's treatment undergo a significant assessment process. WAC 388-60-0165. An agency is free to reject an applicant for treatment. WAC 388-60-0115.

The question of whether revocation is proper for a defendant who made a good faith effort to gain entrance into a treatment program but who was found to be not amenable to treatment is complex. In *State v. Peterson*, 69 Wn. App. 143, 148, 847 P.2d 538 (1993), Division III held that it was improper to sanction an offender for not complying with a sentence requirement that he participate in crime-related treatment or counseling services where he was unable to enroll the particular program he had been

referred to by his Community Corrections Officer (CCO). The court did not address the question of whether an offender who was not amenable to any available treatment could be sanctioned for not entering treatment.

As concerns for both victim and community safety are not satisfied when a defendant either does not enter or does not successfully participate in domestic violence treatment, great care should be taken in crafting a sentence that includes domestic violence treatment as a component to avoid the problems confronting the court in *Peterson.*

VI. Statutory Requirements for Domestic Violence Treatment Providers

A. Statutory Authority

RCW 26.50.150 requires the Department of Social and Health Services to adopt "standards of approval of domestic violence perpetrator programs that accept *perpetrators* of domestic violence into treatment to satisfy court orders or that represent the programs as ones that treat domestic violence perpetrators."

The Legislature also adopted a number of minimum standards that must be satisfied before a program can properly be so qualified. These programs must include:

1. A full clinical intake before the defendant is accepted into treatment.

2. The defendant must be required to sign a release allowing *inter alia*, the victim, the legal advocate, other treating agencies, the court, and probation services access to information.

3. Weekly treatment in a group setting "unless there is a documented, clinical reason for another modality." The statute specifically provides that other therapies such as individual, marital, family, substance abuse, medication, or psychiatric treatment cannot be substituted for the specialized group domestic violence treatment. A minimum period of treatment is to be set by rule of the Department.

4. The treatment "must focus primarily on ending the violence, holding the perpetrator accountable for his or her violence, and changing his or her behavior."

5. The Secretary [of the Department of Health and Human Services] is to establish criteria concerning when treatment is successfully completed – the mere passage of time is not enough.

6. The program must "have policies and procedures for dealing with reoffenses and noncompliance."

7. All staff must be qualified.

RCW 26.50.150(1)-(8).

B. Department of Social and Health Services (DSHS) Regulations

In response to the statutory mandate, DSHS enacted regulations, which are found at WAC 388-60. The regulations were initially enacted effective April 1993. The most recent version of the WACs became effective on April 30, 2001. A copy is contained in Appendix A.

Prior versions of WAC 388-60 authorized the treatment provider, as part of the initial intake procedure, to require that the offender to submit to a chemical dependency or sexual deviancy evaluation and follow up treatment. *See* WAC 388-60-140(7)(b)(1)(repealed). The current regulations "allow" concurrent treatment and require that the offender be stable in other treatment before beginning domestic violence treatment. WAC 388-60-0095(3).

Issues may arise when a defendant refuses to comply, for example, with the agency's requirement that he or she complete chemical dependency treatment when such treatment was not specifically ordered by the court. To date, there are no reported cases dealing with a court finding a violation of probation under these circumstances. It would appear, however, that so long as the reviewing court found that the chemical dependency treatment requirement was reasonable that the refusal to enter chemical dependency treatment would be a violation of probation.

C. Does RCW 26.50.150 Require the Sentencing Court to Refer All Domestic Violence Offenders to Treatment Meeting the Requirements of WAC 388-60?

The scope of who is considered a domestic violence offender is quite broad and can include roommates and former roommates who have never been involved in an intimate relationship, siblings and parents and children. A sentencing court may conclude that the treatment outlined in WAC 388-60 is not appropriate and that some other intervention may be needed. RCW 26.50.150 is not addressed to the sentencing court but rather is addressed to those agencies that hold themselves out as providing treatment for domestic violence perpetrators. Under the statute, a court does not appear to be required to order "non-intimate domestic violence offenders" into WAC 388-60 treatment.

In addition, RCW 26.50.150 clearly does not require that domestic violence treatment be imposed in every case where a judge is sentencing an "intimate domestic violence offender." A court may conclude that an "intimate domestic violence offender" is not appropriate for treatment because treatment has failed in the past, the current offense is particularly egregious, the defendant has failed to accept responsibility for the battering behavior, or because a history of sexual deviancy make it unlikely that the defendant could ever be accepted into a treatment program. All of these factors must be considered by a treatment agency in determining whether a defendant is amenable to treatment. As discussed in Section II, B, 4, difficulties arise in revoking a defendant who is not amenable to treatment. Thus, a court sentencing a defendant who appears to be inappropriate for batterer's treatment should not impose treatment.

Finally, as discussed in Appendix A, if the court concludes that the defendant and victim had been involved in a dating or intimate relationship and that treatment is warranted, treatment pursuant to WAC 388-60 should be imposed.

NOTE: The Court of Appeals has questioned the propriety of filing a prison assault case as a domestic violence charge where the relationship between victim and assailant was simply that of cell mates, with no indication that they had been "involved in a relationship." *State v. Barragan*, 102 Wn. App. 754, 763 n.1, 762 P.3d 942 (2000).

VII. Victim Input at Sentencing

The Washington State Constitution provides that victims of a crime, which is charged as a felony, have a right to make a statement at sentencing.[5] RCW 7.69.030 notes "There shall be a reasonable effort made to ensure that victims, survivors of victims, and witnesses of crimes have . . . rights, which apply to any criminal court and/or juvenile court proceeding."

Although there is no such mandate binding judges in a misdemeanor setting, victim input is desirable for many reasons. The President's Task Force on Victims of Crime in 1982 recommended:

> Judges should allow for, and give appropriate weight to, input at sentencing for victims of violent crime . . . [E]very victim must be allowed to speak at the time of sentencing. The victim, no less than the defendant, comes to court seeking justice . . . Defendants speak and are spoken for often at great length before sentence is imposed. It is outrageous that the system should contend it is too busy to hear from the victim.[6]

A retrospective, published in 2004, affirmed the continuing need "to achieve a balanced criminal justice system that treats crime victims fairly and with sensitivity."[7]

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[1] *Attorney General's Task Force on Family Violence (Final Report)* (Washington, DC: U. S. Attorney General's Office, 1984)

[2] *Final Report of the Washington State Domestic Violence Task Force 1991* (Administrative Office of the Courts, PO Box 41170, Olympia, WA 98504-1170, 360-753-3365, 1991).

[3] The SRA has been the subject of much legislative action. Cites are to the version of the SRA in effect as of August 1, 2001, for crimes committed after July 1, 2001. A detailed discussion of the SRA is beyond the scope of this Manual.

[4] All statutory citations in this section are to the versions that control for crimes committed after July 1, 1985. For crimes committed before that day, see RCW 9.94A.750.

[5] Washington State Constitution, Article I, Declaration of Rights, Section 35, http://www.leg.wa.gov/pub/other/WA_CONSTITUTION.htm.

[6] *The President's Task Force on Victims of Crime, Final Report, December 1982* (Washington, D.C., December 1982), www.ojp.usdoj.gov/ovc/publications/presdntstskforcrprt/front.pdf.

[7] M. Hook and A. Seymour, *A Retrospective of the 1982 President's Task Force on Victims of Crime* (Office for Victims of Crime, Office of Justice Programs, & U.S. Department of Justice, December 2004).